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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAUL PADILLA, JR., Defendant and Appellant.	B183111 (Los Angeles County Super. Ct. No. BA267566)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth N. Sokoler and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Raul Padilla, Jr., challenges his conviction for possession of a weapon in jail. He contends that the trial court should have excluded a statement he made without receiving warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Finding no error, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

During a search of a jail dormitory housing approximately 66 inmates, Los Angeles County Deputy Sheriff Jeff Stosic found a shank (a five and one-half inch plastic toothbrush, sharpened to a point) in bunk 17-B. Custody Assistant Craig Castellanos checked a computerized inventory and learned that appellant was assigned to bunk 17-B. Castellanos then went to the dayroom where the inmates were being held during the search and asked who was assigned to bunk 17-B. Appellant said, "I'm on 17-B."

Castellanos then moved appellant to a cell. He told appellant that a shank was found in his bunk and that he would be going to the hole for violating jail rules. Castellanos testified that he read appellant his *Miranda* rights and appellant waived them. (No issue is raised with respect to the adequacy of the waiver.) Appellant told Castellanos that he had been holding the shank for protection, but that it did not belong to him.

Appellant was charged with possessing a weapon in jail pursuant to Penal Code section 4574, subdivision (a). A prior robbery conviction was also alleged. A jury convicted appellant of possession and found the allegation true. He was sentenced to two years in prison, consecutive to his current term. This appeal followed.

DISCUSSION

Appellant argues that his statements to Castellanos were obtained in violation of his privilege against self-incrimination and were therefore improperly admitted against him. He contends that he should have been advised of his *Miranda* rights before Castellanos asked who was assigned to bunk 17-B.

Miranda warnings are required only when a person is subject to custodial interrogation, that is, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda, supra,* 384 U.S. at p. 444.) "In *Rhode Island v. Innis* (1980) 446 U.S. 291, the United States Supreme Court [held] that *Miranda* rights only come into play when a suspect in custody is subjected to either express questioning or its 'functional equivalent,' i.e., by words or actions on the part of police that they should know are 'reasonably likely to elicit an incriminating response.' [Citation.] California courts have characterized this definition as a two-pronged inquiry: 1) was the officer's remark or action the type reasonably likely to elicit an incriminating response; and 2) even if the officer did not intend to elicit such response, should that officer have known the action or remark was likely to do so? [Citations.]" (*People v. Mobley* (1999) 72 Cal.App.4th 761, 792.)

If a defendant makes a statement in response to custodial questioning or its equivalent under *Rhode Island v. Innis*, in the absence of counsel, the prosecution must demonstrate that the defendant knowingly and intelligently waived the privilege against self-incrimination and the right to counsel. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1192.) "Without a proper warning and proof of waiver, 'no evidence obtained as a result of interrogation can be used against [the defendant].' [Citation.]" (*Ibid.*) A knowing and intelligent waiver of *Miranda* rights may be express or implied. (*People v. Whitson* (1998) 17 Cal.4th 229, 246.) No affirmative statement of waiver is required. Rather, the court can infer a waiver from the actions and words of the person interrogated. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373; *People v. Whitson, supra,* 17 Cal.4th at p. 247.)

In *Mathis v. United States* (1968) 391 U.S. 1, 4-5, the Supreme Court extended the *Miranda* protections to prison inmates incarcerated for an offense different from the one being investigated. Federal courts have delineated an exception to this general rule "where the interrogation is conducted under circumstances where no restraint is placed upon the inmate *over and above that associated with his prisoner status.*" (*People v.*

Fradiue (2000) 80 Cal.App.4th 15, 19, review den. July 12, 2000, italics added.) A leading federal case has identified four factors to consider in determining whether some extra degree of restraint was placed upon an inmate to force him to respond to police questioning: 1) the language used to summon the inmate for questioning; 2) the physical surroundings of the interrogation; 3) the extent to which the inmate is confronted with evidence of his guilt, and 4) the additional pressure exerted to detain him. (*Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 428 (*Cervantes*).)

The facts surrounding appellant's statement to Castellanos are uncontested and we therefore review the court's ruling de novo. (*People v. Mobley, supra,* 72 Cal.App.4th at p. 792.) At an evidentiary hearing, the trial court found that Castellanos's question about the assignment to bunk 17-B was merely investigative and that appellant implicitly waived his *Miranda* rights when he answered the subsequent questions.

As a preliminary matter, respondent argues that Castellanos was not acting as an agent of law enforcement, citing *People v. Claxton* (1982) 129 Cal.App.3d 638, overruled on another ground in *People v. Fuentes* (1998) 61 Cal.App.4th 956, 969, footnotes 10 and 12. There, the court determined that a juvenile hall supervisor with no investigative capacities was not acting as an agent of law enforcement. As appellant points out, respondent did not raise this issue in the trial court. In any event, Castellanos, acting under the direction of Deputy Stosic, clearly acted as an agent of law enforcement in carrying out the investigation. (See *People v. Fradiue, supra,* 80 Cal.App.4th 15 [Department of Corrections employee directed to gather evidence on contraband investigation defined as law enforcement agent].)

We next ask whether Castellanos's initial question, "who was on bunk 17-B," constituted custodial interrogation. We conclude that it did not. Appellant contends that "there is no question that appellant and the other occupants of Dorm 721 were in custody." The fact that appellant was incarcerated does not satisfy the inquiry. We must determine whether some additional pressure, beyond the ordinary restraints placed upon all inmates, was exerted upon appellant to respond to Castellanos's question. (See *People v. Fradiue, supra,* 80 Cal.App.4th at p. 19.)

The nature of the question was investigatory rather than accusatory, since verifying which inmate occupied the bunk did not immediately implicate that inmate in the crime. Castellanos asked the question to ensure the accuracy of his assignment list and begin an investigation, not to accuse appellant of the crime. He testified that it was standard procedure, after a weapon is found, to ask which inmate is assigned to the bunk because "sometimes the purge [bunk assignment list] will say he is on one bunk, but another inmate will be laying on that bunk. So that's why we ask, just to verify that he is actually on that bunk."

This situation is analogous to that in *People v. Fradiue, supra*, 80 Cal.App.4th 15, where prison officials found contraband in an inmate's bunk. A correctional officer, designated the investigating employee for administrative proceedings initiated against defendant, interviewed defendant without providing *Miranda* warnings. The officer conducted the interview from outside defendant's cell. The officer asked defendant whether the drugs found on the shelf belonged to him. Defendant admitted they did. Applying the *Cervantes* test, the court admitted the confession in defendant's criminal trial, reasoning that: 1) the officer interviewed defendant at his cell rather than summoning defendant for questioning; 2) defendant was not alone during the interview, as his cellmate was present; 3) defendant was not handcuffed or otherwise restrained; 4) the investigator remained outside the cell and informed defendant he was free to reject him and request a different investigator; 5) defendant acknowledged he was free to terminate the interview at any time; and 6) defendant was not confronted with any evidence of his guilt.

Here, the *Cervantes* factors weigh strongly against finding custodial interrogation. Castellanos posed the question to approximately 66 men in a large room. Appellant was not singled out or summoned for questioning. None of the inmates was handcuffed or otherwise physically restrained. Castellanos did not provide any information about why he was asking the question or threaten anyone with consequences for not answering. Appellant was free to remain silent, but voluntarily stepped forward and answered the question. We therefore conclude that appellant, though in custody, was not subject to the

coercive custodial atmosphere which was *Miranda's* concern. (See *Cervantes, supra,* 589 F.2d at p. 428.)

Appellant argues that his subsequent statements to Castellanos admitting possession of the shank should have been suppressed because his waiver of *Miranda* rights was involuntary. But appellant provides nothing to support this contention. He instead argues that the later statements should be suppressed as the fruit of a *Miranda* violation. Because we find no *Miranda* violation, we conclude the statements obtained after the warnings and waiver were properly admitted. Moreover, the facts established by the trial court and supported by the record are sufficient to establish an implied waiver because appellant was read his rights, indicated he understood them, and then began answering questions.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

HASTINGS, J.*

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*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.